Supreme Court, U.S.
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No. 99-218

IN THE
SUPREME COURT OF THE UNITED STATES

VICKI LOPEZ-LUKIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its opposition, respondent does not dispute that the questions presented are important issues of substantive federal criminal law. Nor does it dispute that the "honest services" fraud instructions given in this case differ considerably from those routinely given by district courts in other circuits. Indeed, the government affirmatively acknowledges that those other courts give "more extensive instructions" concerning the meaning of a public official's honest services than those upheld by the court of appeals in this case. Resp. Br. 12. Significantly, the government nowhere contends that the questions presented are, as a general matter, unworthy of review.

Instead, the opposition is based solely on the claim that the questions identified in the petition are not actually presented in the case.[1] Respondent argues that the jury instructions in this case *did* adequately define the statutorily-required object of an honest services fraud scheme under 18 U.S.C. § 1346 and did *not* permit Mrs. Lukis to be convicted on the erroneous basis described in the petition (and expressly cited by two separate jurors as the actual basis of their verdict). See Resp. Br. 9-12; Pet. 11. It further contends that the government did not argue before the Eleventh Circuit, and the Eleventh Circuit did not hold, that a public official could properly be convicted on that erroneous basis, *i.e.*, for telling lies about her private life unconnected to any actual corruption of her governmental decisions or actions. Resp. Br. 13-14.

These arguments are either incorrect, beside the point, or both. The first argument is demonstrably untrue, as an examination of the Count One jury instructions readily reveals. The jury instructions in this case *contained no definition at all*

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[1] Petitioner will not address respondent's recitation of the facts, as it is not germane to the issue before the Court. Petitioner notes for the record, however, that respondent's account is tendentious, incomplete, and misleading.

of Mrs. Lukis's "honest services in her official capacity." Nor were they otherwise sufficient to advise a reasonable jury of the line between public corruption and mere lies by a public official. No fair evaluation of the instructions could yield the conclusion, first stated by the district court and subsequently relied on by the court of appeals and now by respondent, that the question whether a guilty verdict could be based on Mrs. Lukis's lies to the press about her love affair with Mr. Lukis was covered "'in here already adequately.'" Resp. Br. 10 (quoting Pet. App. 34a).

The government's second argument is true but irrelevant. We have never contended that the government was forthright in defending the actual basis for the verdict or that the Eleventh Circuit was forthright in affirming it. Pet. 20. It is, on the contrary, the court of appeals' refusal to grapple honestly with the issues in this case that lends special urgency to the request for this Court's intervention. The judgment of the court of appeals needs to be reviewed not simply because it approved a legally defective instruction that would not have been affirmed in other circuits, but also because the court of appeals refused to admit what it was really doing, even -- or perhaps especially -- after it was taken to task for trying to duck the issue by issuing a mute, one-word opinion. Certiorari is necessary precisely to eliminate the important instructional disuniformity that the court of appeals attempted to conceal.

Unless one accepts blindly the pretextual reasoning offered by the Eleventh Circuit in an effort to affirm Mrs. Lukis's conviction while frustrating the prospects for further review, the issues identified in the petition are squarely presented by this case. As such, their worthiness of review is uncontested, and this Court should grant certiorari.

ARGUMENT

I. THE COUNT ONE JURY INSTRUCTIONS DID NOT DEFINE MRS. LUKIS'S "HONEST SERVICES IN HER OFFICIAL CAPACITY" OR PRECLUDE THE JURY FROM CONVICTING HER FOR LYING TO THE PRESS ABOUT HER AFFAIR WITH MR. LUKIS.

Respondent urges that certiorari should be denied because the Count One instructions given by the district court "were substantially equivalent" to the instructions proffered by the defense and "adequately set forth the elements of 'honest services' mail fraud." Resp. Br. 9, 10. That is simply not so.

The critical feature of each written instruction submitted by the defense, as well as each subsequent oral plea for elaboration, was to define for the jury the meaning of a scheme to deprive the public of Mrs. Lukis's "honest services." Pet App. 27a, 30a, 33a-35a. Specifically, the defense instructions sought to advise the jury that the scheme charged in Count One and made criminal by 18 U.S.C. § 1346 involved the corruption of Mrs. Lukis's "honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners." *Id.* at 27a, 30a. This was the critical verbal formulation separating garden-variety dishonesty by a public official from felony mail fraud. Without it, a proper understanding of the charge in Count One was impossible: the jury was left free to credit the prosecution's erroneous theory in closing and find Mrs. Lukis guilty, as the jurors later confirmed they did, because "'she lied to some reporter based on something she mailed.'" *Id.* at 58a.[2]

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[2] Respondent's attempt to rehabilitate the prosecutor's closing argument, while not critical to the Court's consideration of certiorari, is so misleading as to require a brief response. Respondent quotes portions of the summation that

(continued...)

There is simply no way to dispute or obscure the central fact that *the jury instructions on Count One contain no definition whatsoever of the required object of the scheme: the deprivation of Mrs. Lukis's honest services in her official capacity*. Pet. App. 18a. The critical nature of this instructional gap is apparent when one considers that the phrase "honest services" is used at least eight times in those instructions. See *Id.* at 44a-46a. Moreover, in explaining what scheme the prosecution was obliged to prove, the instructions referred the jury back to the terms of the indictment, while expressly *liberating* the jury from having to make the crucial finding: the jury was instructed that "[i]t is not necessary that the Government prove all the details alleged in the indictment concerning the precise nature and purpose of the scheme." *Id.* at 46a. Thus, the jury was left free to assume that it could convict Mrs. Lukis even if it concluded that the *only* legally essential ingredient "concerning the precise nature and purpose of the scheme" -- the bribery allegation -- was false. To make matters worse, the instructions told the jury that the videotape incident could be considered "as evidence of the alleged honest services mail fraud scheme," *id.*, which, absent a definition of

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[2] (...continued)
were properly addressed to the issue of bribery, which was explicitly charged in the counts of the indictment *other* than Count One. *See* Resp. Br. 12 n.3. What respondent fails to mention is that ***each and every time the prosecutor discussed Count One or invoked the concept of honest services, he did so referring only to the lies Mrs. Lukis told the press and the public about her love life and the various events, such as the videotape incident, that were related to it.*** *See, e.g.*, Pet. App. 47a ("The charge is depriving the citizens of her honest services. . . . The citizens of Lee County deserved her honest voice. They deserved honest actions, and what they got was concealment and lies for nearly her entire term."); *id.* at 50a ("[T]he honest thing, the proper thing was to disclose the relationship before the first vote, before the first official act. . . . That disclosure, that revealing of the relationship, that would have been honest services."); *id.* ("They had lied repeatedly to promote their own interests . . . and that dishonesty, that deprivation of honest services should stop here.").

"honest services," might reasonably be construed as an endorsement of the notion that lies told about the videotape incident could form the basis of a conviction on Count One.

Respondent echoes the court of appeals in arguing that the instructions were adequate because they required the jury to find "that petitioner 'solicited or accepted benefits with the intention of being influenced in her official duties.'" Resp. Br. 9-10 (quoting Pet. App. 46a). This sentence was not a definition of "honest services" or the required object of the mail fraud scheme; instead, it was buried in the instructions as a small portion of a subsidiary part of the definition of "false or fraudulent" statement, an element of the alleged scheme the jury almost certainly took for granted in light of Mrs. Lukis's admissions that she had lied to the reporter and others about her relationship with Mr. Lukis. More importantly, however, no matter how many times the court of appeals or respondent repeats or underlines the words "official duties" in this sentence, it is impossible to obscure the fact that this sentence not only fails to save the Count One instruction, it highlights its precise inadequacy: the critical question the instructions never answer, which gives rise to the legal issue presented in the petition, is *what did Mrs. Lukis's "official duties" include for purposes of criminal liability under 18 U.S.C. § 1346*?

The instructions nowhere define "official duties," and that term, taken by itself, adds nothing to the undefined term "honest services in her official capacity," which is used elsewhere in the instructions to describe the required object of the fraud scheme. Pet. App. 45a. Neither term helps the jury understand the critical legal distinction reflected in the proposed instructions Mrs. Lukis tendered to the court: that Mrs. Lukis's "honest services" or "official duties" for purposes of the fraud charge could include only her judgments and actions relating to the official business of the County and not such things as her overall ethics or morals, campaign-related conduct, or the

honesty of her statements to the public or the press. Under this instruction, as long as the jury believed that Mrs. Lukis's "official duties" included dealing with reporters, as the prosecution had argued, the jury was free to convict Mrs. Lukis if it concluded that, as part of her relationship with Mr. Lukis, she accepted gifts, or even affection, knowing that she would deny the relationship if asked by a reporter -- something she herself admitted on the stand. The jury need never have found the "cash-for-influence" scheme it rejected everywhere else and which was the only lawful predicate for a guilty verdict.[3]

This is obviously not, as respondent suggests, an issue of mere wording.[4] See Resp. Br. 10. It is instead an issue concerning the substantive legal adequacy of jury instructions, an issue that is reviewable de novo and fully worthy of this Court's attention. See, *e.g.*, *United States* v. *Grigsby*, 111 F.3d 806, 814 (11th Cir. 1997) (reversal required when court "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations") (internal quotation marks omitted); *United States* v. *Anderton*, 629 F.2d 1044,

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[3] Apparently realizing the inadequacy of this sentence, respondent proffers another, which it never cited or relied upon below, stating that if "'the acts described here during the course of the trial were made as part of th[e Lukises'] ongoing romantic relationship,'" that "'would constitute a complete defense.'" Resp. Br. 11 (quoting 4/15/97 Tr. 2176). This sentence was not part of instructions on Count One describing what the jury had to find in order to return a conviction on that count. It was instead part of the prefatory instruction on the general burden of proof. As such, it is entitled to little or no weight in the instructional analysis and cannot compensate for the defective explanation of the elements of the offense in "the court's definition of the crime itself." *United States* v. *Morris*, 20 F.3d 1111, 1117 (11th Cir. 1994).

[4] Defense counsel expressly advised the district court that it did not "have to . . . use our language, although we think it's well supported in the cases," merely requesting that "somewhere we would like your Honor to instruct the jury what a scheme to defraud of honest services means exactly." Pet. App. 33a.

1049 (5th Cir. 1980) ("[w]hen the instruction uses a term of legal significance, its meaning must be explained, especially when there is a request for clarifying instructions"). Instructions cannot support a guilty verdict if they fail adequately to inform the jury of the salient legal principles necessary to decide the case properly, or to negate legally erroneous theories of liability that the evidence might otherwise suggest. See, *e.g.*, *United States* v. *Morris*, 20 F.3d 1111, 1117 (11th Cir. 1994); *United States* v. *Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986).

That is precisely what happened here. Count One, like all the other counts of the indictment, was a bribery count. As the Eleventh Circuit had itself said in a pretrial appeal, Mrs. Lukis committed the crime charged in Count One only if she accepted money from Mr. Lukis "in exchange for her efforts to secure Board action that favored the interests of Lukis' clients." *United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1170 (11th Cir. 1997). Yet the instructions failed to inform the jury of that crucial fact. If, as other circuits have recognized, "honest services" is a term that needs to be defined, see Pet. 16-19, no fair reading of the Count One instructions can yield the conclusion that this specialized and abstruse legal concept was adequately explained here. Thus, the petition squarely presents the question whether, in an honest services mail fraud prosecution of a public official, the jury must be instructed on the meaning of the public official's "honest services in her official capacity."[5]

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[5] Respondent attempts to draw an artificial distinction between the definition of "honest services" and the definition of "official capacity." Resp. Br. 10-11. The two terms are not separable; "official capacity" is simply part of the concept of "honest services" in a public corruption case. Together they define the scope of what 18 U.S.C. § 1346 prohibits a public official from trading away. In any event, respondent's suggestion that "official capacity," which it appears to concede was not adequately defined, is not a specialized legal term

(continued...)

II. NEITHER THE GOVERNMENT'S BRIEF NOR THE ELEVENTH CIRCUIT'S UNPUBLISHED PER CURIAM AFFIRMANCE INSULATES THE IMPORTANT INSTRUCTIONAL CONFLICT IN THE LOWER COURTS FROM REVIEW.

As the petition notes, there is a clear conflict in instructional practice among the circuits, with at least the First, Seventh, and District of Columbia circuits regularly providing the precise sort of definition of "honest services" the Eleventh Circuit declined to mandate here. Pet. 16-19. Respondent does not dispute the existence of this conflict; in fact, it affirmatively acknowledges it. Resp. Br. 12. Respondent merely attempts to minimize the significance of this conflict by making a variety of arguments which together amount to the observation that the conflict is not patent on the face of the court of appeals opinions from these circuits. *Id.* at 11-14.

That is not a sufficient reason to deny certiorari. Instructional defects, particularly in white collar criminal cases, often fail to ripen into appellate conflicts because acquittals preclude appellate review; the government only infrequently cross-appeals in cases it has won; relatively few prosecutions are brought annually, and even fewer are tried to verdict; and most district courts either get such issues approximately right, or their errors are harmless in light of the evidence. That is presumably one (but not the only) reason that this Court has typically required less in the way of an appellate conflict before granting certiorari on issues of substantive federal criminal law. Pet. 20-21.

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[5] (...continued)
but is instead a common lay term analogous to "distribute" or "manager" is ridiculous on its face. Resp. Br. 10-11 (citing *United States* v. *Lignarolo*, 770 F.2d 971, 980 (11th Cir. 1985) ("distribute"); *United States* v. *Marino*, 639 F.2d 882, 888 (2d Cir. 1981) ("manager")).

But while conflicts of this type may not involve clashes of explicit appellate reasoning, they can be, as this one is, deep and real.[6] They can also be extremely important. This conflict, for example, portends disparate treatment in an area -- criminal prosecutions for public corruption -- that not only has a direct impact on the personal liberty of otherwise notably productive members of the community but also tends to impact the political system and attract a high degree of public interest.

Respondent's treatment of the First Circuit's ruling in *United States* v. *Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996), is instructive in this regard. Respondent argues that *Sawyer* did not hold that an instruction defining "honest services" is required in every case. True enough. But *Sawyer* noted explicitly, in words that could have been written for this case, that "where . . . the line between the merely unattractive and actually criminal conduct is blurred" in honest services fraud prosecutions, "the court must take pains to explain the difference to the jury." *Id.* at 741. In the wake of that decision, the First Circuit adopted a pattern jury instruction requiring "honest services" to be defined and directing district courts in the circuit to look to *Sawyer* for the appropriate explanation of the concept. See *First Circuit Pattern Jury Instructions (Criminal Cases)*, Inst. 4.12 cmt (3) (1998). That is what district courts in the First Circuit have subsequently done, and the resulting instructions have made precisely the distinction that the instructions approved in this case by the Eleventh Circuit failed to. Pet. 17-18.

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[6] The question is not whether the other courts "would regard the instructions given here as legally inadequate." Resp. Br. 12. The question is whether the instructions required and given in those other circuits adequately explain what these instructions left out, and thereby make clear the line between criminality and innocent conduct that would have allowed Mrs. Lukis's jury to render an accurate finding of guilt. They clearly do. Pet. 16-19; Pet. App. 79a-97a.

It is of no moment that the government below did not attempt to defend the proposition that Mrs. Lukis could be convicted for lying to the press about her love life, or that the Eleventh Circuit disclaimed that as its holding. Resp. Br. 13-14. That proposition was the unavoidable implication of the instructions that were given to Mrs. Lukis's jury and of the court of appeals' decision to affirm those instructions. Both the government and the court of appeals knew it. Their appellate sleight-of-hand should not be allowed to blind this Court to the realities of this case and defeat review.

* * * *

The jury instructions upheld by the Eleventh Circuit did not define Mrs. Lukis's "honest services in her official capacity" and left the jury ignorant of the critical distinction between mere dishonesty by a public official and criminal mail fraud. In so doing, the decision below conflicted with the standard practice in other circuits and resulted in the erroneous conviction of an innocent woman. As the Seventh Circuit has written, "[I]f 'not every breach' is criminal fraud, where is the line drawn? Its location cannot be found by parsing § 1341 or § 1346, a profound difficulty in a criminal prosecution." *United States* v. *Bloom*, 149 F.3d 649, 654 (7th Cir. 1998). Review by this Court is necessary to decide whether a public official can be convicted of "honest services" fraud for dishonest press statements and, if not, to make clear that jury instructions in such cases must define for the jury what "honest services" the criminal law obliges a public official to provide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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